UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

TURRET INDUSTRIES, INC. **Employer** **and** **INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 377, AFL-CIO** **Petitioner**	**Case No. 8-RC-16130**

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[1], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

[1] The Parties have filed briefs that have been duly considered.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *All full-time and regular warehouse employees, production employees, shipping and receiving employees at its Warren, Ohio facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.*[2]

The Employer is a steel distributorship that warehouses, buys and sells steel.[3] The Employer operates facilities in Warren, Ohio, and a facility in Leadsdale, PA. The Warren, Ohio facility is the only facility at issue in this case. There are approximately nine employees in the unit found to be appropriate.

In November 1999, the Employer purchased the entire Warren complex from Ohio Cold Drawn, which operated the cold finishing portion of the business. At the time of the asset transfer, Ohio Cold Drawn employed two warehouse/production employees, and 2 managerial/office employees, all whom were subsequently hired by the Employer. On November 20, 1999, the Employer entered into an agreement with the only two warehouse/production employees. The agreement sets forth wages, benefits, hours and other terms and conditions of work.

The only issue in this case is whether the agreement signed by the two employees working for the Employer at the time of the transfer operates as a bar to the instant petition. The Employer submits that the agreement signed by the two employees is a collective bargaining agreement that bars the instant petition, while the Petitioner contends it does not.

The record evidence demonstrates that in late November 1999, Paul Noble, Vice President and General Manager of the Employer and Philip Holmes, Chief Financial Officer of the Employer, met with Tom Bogovich and Brian Smith, the only production/warehouse

[2] The unit description is in accord with a stipulation between the Parties.

employees. Noble and Holmes provided Bogovich and Smith with an agreement similar to one utilized at the Employer's facility in Leadsdale, PA. The record evidence indicates that the parties met two or three times prior to the execution of the agreement. On November 30, 1999, Bogovich and Smith executed the agreement, which sets forth wages and other terms and conditions of work. Upon the execution of the agreement, Bogovich and Smith received a wage increase. Approximately six to eight months after the transaction, Bogovich and Smith both resigned their employment.

The agreement signed by Bogovich and Smith provides for employee wages, hours of work, benefits and other terms and conditions of work. Noble testified that he informed some new hires about the agreement and placed a copy of the agreement in the break room. Noble testified that he informed some employees that they would receive a copy of the agreement after a 90-day period. Two current employees testified at the hearing that they were not informed at the time of their hire of such an agreement nor was a copy of the agreement provided to them after 90 days. The agreement contains provisions for an employee committee, consisting of three unit employees elected by employees in the unit. The agreement also contains a provision for employee complaints.

The record indicates that Bogovich and Smith, as the only employees of the Employer at the time of the agreement, constituted the employee committee. Noble testified that no new members of the committee were elected after the departure of Bogovich and Smith. The record evidence further demonstrates that after learning about the agreement, current employees asked Noble about re-establishing such a committee, Noble informed employees that the employees must have at least one year of seniority in order to have an employee committee.

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[3] In late summer 2000, the Employer eliminated the steel processing function of its operation.

The evidence further establishes that the grievance provision in the agreement has never been utilized by any of the present employees.

The Board enunciated the contract-bar rule in **Hexton Furniture Co., 111 NLRB 342, 344 (1955)**, in which it stated, "[t]he Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective bargaining agreement of reasonable duration." The Board has long held that the contract-bar rule exists to promote stable collective-bargaining relationships and, at the same time, to afford employees with a reasonable opportunity to change or eliminate their bargaining representative.[4] The Board has considerable discretion in the formulation and application of the contract-bar rule and has the authority to waive or apply the rule in order to effectuate its policy underpinnings.[5] The burden of proving that a contract is a bar is on the party asserting the doctrine.[6]

The Board in **Appalachian Shale Products, 121 NLRB 1160 (1958)**, set forth the basic requirements for a contract to serve as a bar to an election. The contract must be in writing; it must be executed by the parties; it must substantially contain the terms and conditions of employment; it must clearly by its terms encompass the employees involved in the petition; and it must cover an appropriate unit.

The Board has long held that even some contracts that meet the criteria set forth in **Appalachian Shale Products** are excepted from the contract-bar doctrine due to changed circumstances,[7] such as changes in the size or nature of the unit,[8] and defunctness of the representative.[9]

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[4] East Mfg. Corp., 242 NLRB 5 (1979).
[5] See El Torito-La Fiesta Restaurants, Inc., 295 NLRB 493, 494 (1989).
[6] Roosevelt Memorial Park, 187 NLRB 517 (1970).
[7] General Extrusion Co., 121 NLRB 1165 (1958).

The Board in **General Extrusion Co.** contemplated the relevance of changed circumstances of an employer's workforce complement in the application of the contract-bar doctrine. In that case, the Board held that "a contract does not bar an election if executed before any employees had been hired or (2) prior to a substantial increase in personnel."[10] In the event of a substantial increase in personnel, the Board held that "a contract will bar an election only if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed."[11] In **United Service Company d/b/a A-1 Linen Service, 227 NLRB 1469 (1977)**, the intervenor and the employer entered into an agreement with an expiration date of May 3, 1976. The intervenor and the employer entered into negotiations for a successor agreement, which was not executed until May 3, 1976. The petitioner in that case filed its petition on April 8, 1976, prior to the execution of the new agreement between the intervenor and the employer. At the time of the execution of the old agreement, the employer had only four employees. At the time of the hearing, the employer had fourteen employees but added no new job classifications. The Board found that even though no new job classifications were added by the employer, the old contract in that case was not a bar to an election because the employer's workforce underwent such a substantial expansion that the contract could not serve as a bar. The Board further found that the new agreement between the intervenor and the employer was not a bar as it was executed after the date the petition was filed[12]

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[8] New Jersey Natural Gas Co., 101 NLRB 251 (1953).
[9] Hershey Chocolate Corp., 121 NLRB 901 (1958).
[10] See 121 NLRB 1165, 1167 (1958).
[11] Id. at 1167.
[12] 227 NLRB at 1470.

In the instant case, the record evidence demonstrates that at the time of the execution of the agreement, the Employer employed only two employees. Noble testified at the time of the execution of the agreement on November 30, 1999, the Employer entered into the agreement with the only two production employees, who were Bogovich and Smith. At the time of the hearing, the Parties stipulated that there are approximately nine employees in the unit. Thus, approximately 22 percent of the Unit employed at the time of the hearing had been employed when the agreement was executed.[13] Due to the substantial increase of the Employer's workforce, I find that the agreement is not a bar to an election.

As an additional basis for directing an election in this matter, I note that defunctness of the representative is also an exception to the contract bar doctrine. In **Hershey Chocolate Corp., 121 NLRB 901 (1958)**, the Board stated that "a representative is defunct, and its contract is not a bar, if it is unable or unwilling to represent the employees. However, mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees.[14] In **Kent Corporation, 272 NLRB 735 (1984)**, the Board held that the Regional Director erred in finding that the employee committee was defunct. In that case, there were two remaining members of the employee committee who testified their willingness to continue to represent the employees, to abide by the association's bylaws and to hold meetings, collect dues, and handle grievances.[15] The Board held that the willingness and ability of the representative to represent employees is the critical question in determining defunctness.

[13] The Employer's brief sets forth that there are only eight employees in the unit. It should be noted that in the event that there are only eight employees, only 25 percent of the current employees were employed at the time of the execution of the agreement.
[14] 121 NLRB at 910.

In the instant case, the agreement provides for an employee committee consisting of three employees to be elected by the hourly rated employees. The agreement provides that the committee members will be elected on a basis considered appropriate by members of the unit. The record evidence indicates that Bogovich and Smith were the sole members of the employee committee and new members were not elected upon their departure. After the commencement of the Union's organizing campaign, the record evidence indicates that the employees' request to have a committee was denied by Noble, who stated that employees must have at least one year of seniority in order to have a committee.

No evidence was presented at the hearing to demonstrate that the employee committee is in existence or is either willing or able to represent the employees in the unit. The committee does not have any members and has not had any members since approximately mid-year of 2000[16]; it does not collect dues or have meetings; and it does not process employee grievances. It is unrebutted that the Employer has refused employees the right, as set forth in the agreement, to elect new members of the employee committee. Based on the foregoing, I find that the employee committee is defunct because it no longer exists and therefore is unable to represent the employees in the Unit. The Employer has eliminated the committee's ability to represent employees by refusing the employees' request to elect new members to the committee.

I find the Board's decision in **Kent Corporation, 272 NLRB 735 (1984)**, relied on by the Employer, is distinguishable. In that case, the committee had existing members who testified regarding their willingness to represent the employees in the unit. Furthermore, the Employer's reliance on the Board's decision in **Moore Drop Forging Company, 168 NLRB 984 (1967)** is similarly misplaced as in that case, an employee committee actually existed with members who

[15] 272 NLRB at 736.
[16] Noble was unable to accurately identify the resignation dates of Bogovich and Smith.

actively negotiated terms and conditions of work with the employer without the interference of employer control over the existence of the committee.

The Employer suggests that the employee committee has not failed to provide representation to its employees as no issues have arisen which would have required the committee's action. In support of this position, the Employer relies on **Road Materials, Inc., 193 NLRB 990 (1971)**, in which the Board the contract barred an election despite some evidence of inaction and possible negligence on behalf of the union when the employees had not sought any specific action by the incumbent Union. The incumbent Union maintained it was willing and able to administer the contract. In the instant case, the record evidence indicates no grievances have been filed pursuant to the agreement between the Employer and the employee committee. The evidence also provides that the Employer, upon hiring new employees, did not regularly inform employees of the existence of the agreement, nor did it provide copies of the agreement to employees as specified in the agreement. The testimony presented at the hearing indicates that at some time after the commencement of the Union's organizing drive, a copy of the agreement lacking the page with signatures was placed in the employee break room. Given the departure of Bogovich and Smith, it is clear that the employees were provided with little to no information regarding the employee committee and the agreement.

Accordingly, based on the above, I find that the agreement between Bogovich and Smith and the Employer does not bar an election. Accordingly, I shall direct an election in this matter.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit

who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Brotherhood of Teamsters, Local 377, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966)**; **N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the ***full*** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of

time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by December 19, 2000.

Dated at Cleveland, Ohio this 5th day of December, 2000.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

347-4050-0100